

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



75-7098

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S

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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DEVLIN ADAMS, by ROSSINI ADAMS,  
his parent and natural guardian,

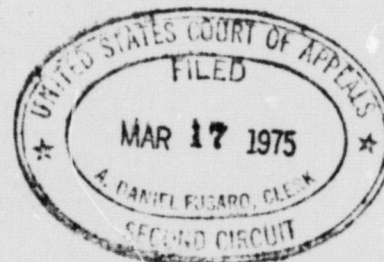
Plaintiff,

-against-

CASPAR WEINBERGER, Secretary of  
Health, Education and Welfare,

Defendant.

----- x



BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from a decision and order of Judge Anthony J. Travia of the United States District Court for the Eastern District of New York, dated November 25, 1974. It has not been reported.

STATEMENT OF THE ISSUES

1. Did the district court err in finding that the wage earner had not lived with infant plaintiff so as to entitle infant plaintiff to death benefits under the Social Security Act?

2. Did the district court err in finding that the wage earner had not contributed to the support of infant plaintiff so as to entitle infant plaintiff to death benefits under the Social Security Act?

3. Did the district court err in holding that the Social Security Act, 42 U.S.C. §416 (h) (3) (C) (ii), which imposes additional conditions of eligibility for death benefits on some illegitimate children but not on legitimate children or other illegitimates, does not violate the fifth amendment to the Constitution?

STATEMENT OF THE CASE

Plaintiff ROSSINI ADAMS brings this action on behalf of her infant son, DEVLIN ADAMS, to secure for him benefits under the Social Security Act as a result of the death of his natural father, PETER MCGINN, JR.

ROSSINI ADAMS, on behalf of DEVLIN ADAMS, applied for child's insurance benefits under the Social Security Act, 42 U.S.C. §402 (d) (1) (C) (ii). On August 5, 1970 defendant finally denied the application. Defendant's denial was based on the theory that since DEVLIN ADAMS was an illegitimate child of PETER MCGINN, JR. he had to meet certain additional conditions of eligibility not required of legitimate children: specifically DEVLIN ADAMS had to show either

(1) that he could, under the intestacy law of the wage earner's domicile, inherit the deceased wage earner's personalty, 42 U.S.C. §§ 416 (h) (2) (A), 416 (e) (1), and 402 (d) (3); or

(2) that he was the child of a marriage invalid because of the existence of an impediment when the marriage ceremony was performed, 42 U.S.C. §§ 416 (h) (2) (B), 416 (e) (1) and 402 (d) (3); or

(3) that the wage earner prior to his death had either

- (a) acknowledged him in writing
- (b) been decreed by a court to be his father, or
- (c) been ordered by a court to contribute to his support, 42 U.S.C. §§ 416 (h) (3) (C) (i), 416 (e) (1), and 402 (d) (3); or

(4) that the wage earner was living with or contributing to the support of the illegitimate child at the time of his death, 42 U.S.C. §§ 416 (h) (3) (C) (ii), 416 (e) (1) and 402 (d) (3).

Defendant found that although there was no dispute as to DEVLIN ADAMS' parentage, he could meet none of these special requirements. In particular, defendant found that DEVLIN ADAMS' father had neither lived with him nor contributed substantially and regularly to the support of his posthumously born son.

On May 3, 1973, plaintiff brought the present action in the United States District Court for the Eastern District of New York contending that the record established the facts of contribution to support and joint residency

within the meaning of the law, but that defendant erred, as a matter of law, by imposing eligibility requirements not found in the statute. Alternatively plaintiff argued that the Social Security Act itself was unconstitutional because it placed additional conditions of eligibility on certain illegitimate children in a discriminatory manner.

By decision and order dated November 25, 1974, Judge Anthony Travia granted defendant summary judgment dismissing the complaint. Plaintiff filed a notice of appeal to this Court on December 20, 1974.

STATEMENT OF FACTS

ROSSINI ADAMS is the unwed mother of DEVLIN ADAMS. PETER MCGINN, JR. was the father of DEVLIN ADAMS and the wage earner on whose account the application for Social Security benefits was made. He died on February 18, 1970, less than a month before DEVLIN ADAMS was born on March 8, 1970. The undisputed testimony of ROSSINI ADAMS showed that she met the decedent in late 1968, Transcript of Hearing (hereinafter "R.") 28 and 99, started a serious personal relationship with him in early 1969, id., and began living with him in his apartment in June 1969. In January 1970 she left the apartment and stayed with her mother prior to her confinement. R. 31.

Ms. ADAMS' testimony also established that during the time when she was living with the decedent at his apartment, and after she had gone to her mother's house, the decedent gave her money for her support; that the decedent had stated that he would pay for all the medical and hospital expenses associated with DEVLIN ADAMS' birth; that he estimated that the hospital bill would be about one thousand dollars; and that he supplied an initial payment of one hundred dollars towards the hospital bill. R.32-34,

51-54, 99, 103.

Defendant did not dispute any of these facts, but based his denial of benefits on a finding that the wage-earner had neither lived with nor contributed substantially and continuously to the support of his posthumously born son. Defendant's Memorandum of Law, Adams v. Weinberger, No. 73 C 633 (E.D.N.Y.).

ARGUMENT

POINT I

THE DEFENDANT AND THE COURT  
BELOW APPLIED ERRONEOUS LEGAL  
REQUIREMENTS IN FINDING THAT  
THE WAGE-EARNER WAS NEITHER  
LIVING WITH NOR CONTRIBUTING  
TO THE SUPPORT OF HIS SON.

- A. The Social Security Act should be  
construed in favor of potential  
beneficiaries.

In Herbst v. Finch, 473 F.2d 771, 775 (2d Cir. 1972), this Court said that "congressional policy underlying the federal social security legislation requires the court to interpret the Social Security Act liberally, and any doubts should be resolved in favor of coverage." The Herbst decision accords with the generally accepted rule that the Social Security Act is to be construed liberally in favor of those seeking its benefits. In Schmiedigen v. Celebrezze, 245 F.Supp. 825, 827 (D.D.C. 1965), for example, the court stated,

"The Social Security Act, especially its insurance provisions, was a far-reaching, epoch making, beneficent enactment. As a remedial statute, it should receive a liberal construction rather than a narrow interpretation. . . .

"(E)very legislative enactment must receive a sensible and reasonable construction that would effectuate its purposes. If a strict, literal interpretation would frustrate the objective of the legislative body and would lead to an absurd or futile result, it must be avoided."

Far from applying in this case the liberal and pragmatic standard required by law, defendant and the court below added restrictive eligibility requirements not found in the Act and based their decisions on these additional requirements.

B. Plaintiff was living with the wage earner at the time of his death.

A series of cases holds that a claimant is "living with" a wage earner under 42 U.S.C. 416 (h) (3) (C) (ii), even if there was a period of separation prior to the latter's death.\* The universally applied rule is that the wage earner was legally living with the claimant if the separation which occurred prior to his death was caused by forces beyond his control. In Bridges v. Secretary of HEW, CCH 1971 Unemployment Ins. Rep., ¶16,480 at 2499-450 (E.D.N.Y. 1971), the court held that a wage-earner who had spent many months in North Carolina for health reasons prior to his death was nonetheless "living with" his out of wedlock child. In Wagner v. Finch, 413 F.2d 267 (5th Cir. 1969), the mother and the father did not maintain a home together; they shared weekend visits which the court considered sufficient to meet the "living with" requirement:

\*Defendant concedes that claimant's posthumous birth does not bar a finding that his father was either living with him or contributing to his support at the time of his birth. See, e.g. Wagner v. Finch, 413 F. 2d 267 (5th Cir. 1969), in which the court held that "Medically speaking, Donna (the child) was viable from the instant of conception onward." and that,

"We would strain ordinary meaning to require that all the proper pre-requisites to maintaining a home are the sine qua non to entitlement under the Act. We find nothing in the legislative history to assist with the definitions of the phrases 'living with' and 'contributing to'. Apparently Congress did not discuss or contemplate any dollar amount of support or minutes, hours, days or years of 'living with' in order to qualify, once the fact of parenthood was established." Id. at 268.

To the same effect is Crisp v. Richardson, CCH 1972 Unemployment Ins. Rep. ¶16,612 at 2105 (W.D.N.C. 1972), where the court held that the requirement of "living with or contributing to the support" of the child was met when the separation was caused by reasons beyond the wage earner's control. In the Crisp case, the wage earner was arrested and imprisoned two weeks after the conception of the plaintiff. At the time of arrest the wage earner was married to another woman; although not living with his legal wife, the wage earner never lived with the infant plaintiff, nor with plaintiff's mother during the mother's

.....

"where there is no case law which interprets the 'living with' provision of the statute, we agree that the illegitimate child of a deceased father, conceived before, but born after, the father's death, is sufficiently 'in being' to be capable of 'living with' the father at the time of his death. The fact that a worker dies before the birth of a child already 'in being' is no legal or

pregnancy. The court allowed plaintiff to recover child's benefits holding that the intent of the Social Security Act would be frustrated by disallowing benefits. Crisp v. Richardson, supra. In Schmiedigen v. Celebrezze, supra, the wage earner was held to be "living with" his wife even though she had been committed to a mental institution well prior to his death.

In this case, the hearing officer found that the wage earner lived with ROSSINI ADAMS until one month before his death. R. 16, ¶ 2. It was she who decided to leave their apartment and return to her mother's home:

"We had our personal conference, him and I, and I thought it better if I went back home and stayed with my mother due to my pregnancy, and he said to me if I didn't want the child after I had it, to give it to him..." R. 31.

Again, the hearing officer expressly found that their separation was due to her act, not the wage earner's, R. 16, ¶ 2. Any chance for reconciliation was eliminated when the wage earner met his unexpected death. R. 15.

If ever there was one, this is a case in which the wage earner was separated from his unborn son due to forces beyond his control. Surely the separation is as

.....

equitable reason to prohibit that child from benefits." Id. at 268 and 269.

involuntary here as where the wage earner leaves the children for health reasons (Bridges, supra) or because he is incarcerated as a result of his criminal acts (Crisp, supra). Indeed in the latter two cases there was greater volition on the wage earner's part than here, where the mother moved out of his home.

The district court accepted "the general rule... that the wage earner was legally living with the claimant if the separation which occurred prior to his death was caused by forces beyond his control," Slip Opinion, p. 6, and found that it was Ms. ADAMS' decision to leave, not the wage earner's. Id. Nevertheless, that court held that Ms. ADAMS' decision to leave was not beyond the wage earner's control because "the separation was apparently precipitated by the wage earner and the claimant's incompatibility." Id. The court's opinion does not indicate how the fact of incompatibility makes the separation any more voluntary on the part of the wage earner. If, in fact, Ms. ADAMS and the wage earner were incompatible, this would make it all the clearer that there was nothing the wage earner could do to reverse Ms. ADAMS' decision to leave.

What the court below did, in effect, was to create a new legal requirement, that the wage earner not be

morally responsible for the separation, and then to find that the wage earner in this case was morally responsible for Ms. ADAMS' decision to leave. No legal basis for such a requirement can be found either in the Social Security Act or in the cases. In fact, Crisp v. Richardson, supra, in which the separation was caused by the imprisonment of the wage earner, presents the clearest possible case in which the wage earner was morally responsible for the separation. Nevertheless, the Crisp court found that the separation was involuntary and ordered the granting of benefits.

Since the court below and the defendant gave a legal interpretation to the "living with" requirement of the Social Security Act more restrictive than the case law allows, the defendant may not rely on the court's usual reluctance to disturb his findings of fact. As the court said in Bridges v. Secretary of HEW, supra at 2499-465,

"The government contends that this court is powerless to reverse the final determination of the Department of Health, Education and Welfare because it is supported by 'substantial evidence.' 42 U.S.C. §405 (g). This argument is without merit where the administrative decision is based on a mistake of law."

The mistake of law in Bridges was the very mistake made here: the use of a too narrow definition of the "living with" requirement. See also Herbst v. Finch, 473 F.2d 771, 774-775 (2d Cir. 1972).

Accordingly, this court should, like the courts in Bridges, Crisp, and Schmiedgen, direct defendant to pay appropriate benefits to infant plaintiff.

C. The wage earner was contributing to the support of the infant plaintiff.

The Court must also rule for plaintiff if it finds that the wage earner was "contributing to the support of the applicant at the time [he] died." 42 U.S.C. §416 (h) (3) (C) (ii). Defendant and the court below each found that the wage earner was contributing at least some support at the time of death. But the defendant denied the claim because he found that there was no showing that this support was "regular" and "substantial". R. 16, Findings, ¶ 5. The court below affirmed on the theory that the support was not shown to be "regular and continuous". Slip Opinion, p. 7.

None of the additional requirements imposed below, "regularity", "substantiality" or "continuity", is found in the Social Security Act and none of them can be justified under it. The court below recognized that there was at least some doubt about the legal basis of these additional conditions of eligibility. It noted that the requirement imposed by the defendant that the contribution be "substantial" was without legal basis, but the court itself imposed without explanation the additional requirement of "continuity" of contribution, which is no more justified

under the Act. Slip Opinion, pp. 7-8, n. 4.

Neither is any of the three extra requirements supported by the case law. In Crisp v. Richardson, supra, the court found the contribution requirement met by a wage earner imprisoned only two weeks after his daughter was conceived. He gave the child's mother "some money" to pay the hospital bill and "approximately" thirty dollars per month until a year before his death when he stopped contributing anything at all. In reversing the defendant's holding, the court said,

"The reconsideration determination of the Appeals Council...states that there is a rule to the effect that the children can be entitled to benefits only if they were receiving regular and substantial contributions from the wage earner at the time of death or during the twelve-month period preceding death. The source of this rule is not cited, but it, appears to be a Social Security Administration regulation, 20 C.F.R. §404. 350... It is not clear at all that the rule applies to children's insurance benefits...The relevant case law does not support denying the claim based on a twelve month support period rule." Id. at 2108

In Bridges v. Secretary of HEW, supra, the Court found the necessary contributions present even though they were nominal and sporadic. The court stated,

" 'Apparently, Congress did not discuss or adopt any dollar amount

of support...to qualify once the fact of parenthood was established.' " Id. at p. 2499-462, quoting Wagner v. Finch, 413 F.2d 267, 268 (5th Cir. 1969).

The court found the requirement met even though the wage earner ceased making any contributions eleven years before he died. Id. at 2499-461.

In Mobley v. Richardson, CCH 1971 Unemployment Ins. Rep. §16, 439 at 2499-368 (W.D.N.C. Sept. 8, 1971), cited by defendant below, the court nowhere set forth additional requirements for "contribution." Rather, it found that the wage earner met the contribution requirement when he "contributed regularly to (the children's) support up until a few months before he died, when he ceased having any income and was no longer able to contribute." Id. at 2499-369.

The only case defendant can cite in which a court actually held against a claimant on the contribution issue is Norton v. Richardson, 352 F.Supp. 596 (D. Md. 1972), reconsidered sub. nom. Norton v. Weinberger, 364 F.Supp. 117 (D. Md. 1973) (3 judge court), rev'd and remanded, 94 S. Ct. 3191 (1974), and that decision has now been vacated by the Supreme Court. There the district court found that the wage earner had contributed only six dollars and some

baby clothing to the child, Id. 352 F.Supp. at 600, and affirmed the rejection of the claim. This hardly establishes a requirement of "regular", "substantial" or "continuous" support. On reconsideration of the issue by the three judge court, the holding was narrowed even further. The court said,

"Moreover, past cases have demonstrated that, under the view that the Social Security Act should be construed to include rather than exclude, the dependency requirement will be liberally interpreted to avoid fortuitous hardship....Other courts along this same line have construed the living with or support by requirement of §416 (h) (3) (C) (ii) liberally in face of hardship, and have indicated that in the proper case the arbitrary, although permissible, line drawn that dependency exists at the time of death will not bar an otherwise just claim." Id. 364 F.Supp. at 1130.

Ultimately the Norton decision may have rested on a finding that the claimant had no expectation of support from the deceased. See 364 F.Supp. at 1129. Even that requirement, not adopted by other courts, would not justify defendant's withholding of benefits to this plaintiff. A reasonable expectation of support clearly existed in the present case: the wage earner gave his child's mother \$100 for a down payment on the hospital

bill, R. 34. He repeatedly assured her in the presence of others that he would pay the entire medical bill, R. 32 (testimony of ROSSINI ADAMS), R. 51-52, 53, (testimony of Judith Anglin). Furthermore, the wage earner was concerned that the mother continued her job as a bookkeeper during her pregnancy and urged her to stop working, promising to support her, R. 54-5. Ms. Anglin testified at R. 54,

"Q. Is there anything else you can remember about - that you think may help the officer here?

A. I knew he asked her if she wanted anything; if she was feeling well enough, and he insisted on one occasion that she stop working, and she told him she wanted to keep working until it was time to have the baby, but he told her he would rather that she not work for the 4, 6 or 7 months."

Additional evidence of the intent to support was provided when the wage earner asked that Ms. ADAMS give him the baby to care for if she did not want it. R. 31.

Of course, the wage earner had also established a pattern of actual contributions as well as promises. He paid for the initial hospital fee. R. 34. He paid the rent for the apartment he shared with his child's mother. R. 100. Finally, he contributed to the mother's other normal living expenses, R. 33-34, 99, 103. That the wage earner did not pay for the food or clothing of the infant

claimant is irrelevant since his own death prevented him from fulfilling his stated intent. He did provide everything that the unborn infant needed for as long as he could.

The evidence overwhelmingly shows that the statutory requirement of contribution to support as defined in the cited cases has been met. What the defendant and the court below found were not met were their self-created requirements of "regular, "substantial" or "continuous" support. For this legal error alone, the decision below must be reversed.

## POINT II

THE SOCIAL SECURITY ACT  
DISCRIMINATES AGAINST  
INFANT PLAINTIFF AND  
OTHER SIMILARLY SITUATED  
ILLEGITIMATE CHILDREN IN  
VIOLATION OF THE FIFTH  
AMENDMENT TO THE CONSTITUTION

- A. 42 U.S.C. §416 (h) (3) (C) (ii)  
is unconstitutional under Supreme  
Court decisions outlawing dis-  
crimination against illegitimate  
children.

If infant plaintiff had been born in wedlock, the Social Security Act would not require him to prove he lived or was supported by the wage earner as a condition of getting benefits. 42 U.S.C. §402 (d) (3). Or, if infant plaintiff had been entitled to inherit under state law, had been acknowledged or adjudicated to be his father's child, or had been illegitimate by reason of a defective marriage, he would not have had to offer such proof. 42 U.S.C. §§ 402 (d) (3), 416 (h) (2), 416 (e) (i). Undeniably, then, the Act discriminates against illegitimate children like plaintiff, both in relation to legitimate children and relative to other illegitimate children. This discrimination is unconstitutional unless the government can meet the heavy burden of justification which the Supreme Court has required of similar statutes.

In Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), the Court struck down a Louisiana statute which denied out-of-wedlock children the right to recover workmen's compensation benefits on an equal footing with legitimate children. In reaching this result, the Court said,

"Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny, [citations omitted]." Id. at 172.

The Court took special pains to point out the unjustness of penalizing a person for the marital status of his parents, noting that this "is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." Id. at 175. Because of this inherent injustice the Court applied its "legitimate state interest" test very stringently against the Louisiana statute. Similarly, in Gomez v. Perez, 409 U.S. 535 (1973), the Court held that illegitimate children cannot be denied a judicially enforceable right to paternal support so long as legitimate children enjoy such a right. In a valuable summary of its

holdings in this area, the Court said,

"Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." Id. at 538.

The same standard which the Court used in measuring discriminatory state laws is applicable to federal statutes under the due process clause of the fifth amendment. See, e.g., Bolling v. Sharpe, 347 U.S. 497 (1954); Faruki v. Rogers, 349 F.Supp. 723 (D.D.C. 1972). The government is unable to meet it in this case.

At the end of its 1973 term, the Supreme Court decided three cases involving issues closely related to those here. These decisions collectively point towards a decision for plaintiff here. They were Jimenez v. Weinberger, 94 S. Ct. 2496 (1974), reversing Jimenez v. Richardson, 353 F.Supp. 1356 (N.D. Ill. 1973) (3 judge court); Weinberger v. Beaty, 94 S. Ct. 3190 (1974), affirming 478 F.2d 300 (5th Cir. 1973); and Norton v. Weinberger, supra. The last case, Norton, is especially significant because in it the lower court upheld the constitutionality of the same statutory scheme at issue here. The Supreme Court's vacatur in Norton deprives

defendant of the precedent on which he principally relied below and leaves him without any favorable citations. Since the Supreme Court remanded Norton with directions to reconsider in the light of the Jimenez opinion, we now turn to that case.

In Jimenez v. Weinberger, supra, the Court was faced with a statutory scheme which closely paralleled the one presently at issue. There the challenged statute denied Social Security disability benefits to some illegitimate children while granting them to similarly situated legitimate children and some illegitimate children. Specifically, the provisions in Jimenez allowed legitimate children to collect benefits without regard to whether they were born before or after the onset of the wage earner's disability, 42 U.S.C. §§ 402 (d) (3), while "after-born" illegitimate children could recover only if they meet one of several special requirements. 42 U.S.C. §§416 (h) (2) (B), 416 (h) (3) (B). The special requirements for illegitimates challenged in Jimenez are largely parallel to those involved in this case: the illegitimate child would have to show he could inherit under state law, that he had been acknowledged or adjudicated to be the wage earner's child or that he was illegitimate by reason

of a defective marriage.

The Court found the Jimenez statute unconstitutional both because it discriminated against the illegitimate vis-a-vis the legitimate, 94 S. Ct. at 2500, and because it discriminated against some illegitimates vis-a-vis others, id. at 2501. As to the first order of discrimination, the Supreme Court reiterated its view that

" 'The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting the condemnation on the head of an infant is illogical and unjust.... Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where \*\*\* the classification is justified by no legitimate state interest, compelling or otherwise.' " 94 S. Ct. at 2499 quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175-6 (1972).

The Court rejected the notion that the relaxed equal protection standard of Dandridge v. Williams, 397 U.S. 471 (1970), was relevant. 94 S. Ct. at 2500. Rather, it placed on the Secretary the burden of justifying the differing treatment and held that the Secretary had "no evidence" which supported his argument that the scheme was necessary to conserve funds and prevent fraud. Id.

As to the discrimination between classes of illegitimates, the Court condemned the illogic of allowing some children to recover and denying others,

"Thus, for all that is shown in this record, the two sub-classes of illegitimates stand on equal footing,... hence to conclusively deny one sub-class benefits presumptively available to the other denies the former the equal protection of the law guaranteed by the due process provisions of the Fifth Amendment." Id. at 2502\*

Although Jimenez is not identical to this case, it should control the result here. One distinction between the cases is that Jimenez involved disability rather than the death benefits at stake here. But this variation invokes no different policies of the Social Security Act. It is also true that in Jimenez illegitimates did not have the opportunity to obtain benefits if they could meet the "support" or "living with" standards, because they were born after the onset of disability, 42 U.S.C. §416 (h) (3) (B). But this is not a crucial distinction because it does not eliminate the discrimination against and among illegitimates present in both cases. Furthermore, the court did not rely on this aspect of the Jimenez problem.

\*The last of the three cases decided by the Court last term reflects the same approach. Weinberger v. Beaty, *supra*, affirmed without opinion a Fifth Circuit decision holding unconstitutional the same statute at issue in Jimenez. See also Severance v. Weinberger, 362 F.Supp.

Rather, it merely noted that plaintiff's problem was "compounded" by the absence of a provision permitting him to prove dependency. 94 S. Ct. 2501.

1348 (D.D.C. 1973) (3 judge court); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.) (3 judge court), aff'd, 409 U.S. 1069 (1972); Davis v. Richardson, 342 F. Supp. 588 (D. Conn.) (3 judge court), aff'd, 409 U.S. 1069 (1972).

B. The district court based its decision on the erroneous assumption that it is the policy of the Social Security Act to deny benefits to children not previously supported by the wage earner.

Citing Jimenez, the court below found that the challenged classification was

"reasonably related to the prevention of spurious claims inasmuch as these provisions seek to insure dependence which presumably exists in the case of legitimate children and illegitimate children whose paternity has been acknowledged, decreed by a court or whose parents have been ordered by a court to contribute to the children's support." Slip Opinion, p. 11.

The court assumed that a "spurious claim," as the term was used in Jimenez, was one in which the child had never been dependent on the wage earner and that it was a policy of the Social Security Act to bar such claims. This is incorrect. Although the Jimenez opinion is not entirely clear on this point, the "spurious claims" referred to by the Court were apparently claims in which paternity itself was fabricated, 94 S. Ct. at 2501. The court specifically found in Jimenez that the purpose of the Social Security Act was not limited to providing benefits for children who had actually been dependent on the wage earner, since

"Under the statute, it is clear that illegitimate children born after the wage earner becomes disabled qualify for benefits if [they meet any of the special conditions]." 94 S. Ct. at 2501.

Thus Jimenez indicates that the purpose of the Social Security Act is to provide benefits to children who have lost either support which was previously being provided or the legal right to support which previously existed. This view is confirmed by the legislative history of the children's insurance provisions at issue here. The House-Senate Conference Committee Report on the 1965 Amendments to the Social Security Act which created the program stated that benefits were intended to be provided "if the father was supporting the child or had a legal obligation to do so." 111 Cong. Record 18387 (July 27, 1965).<sup>\*</sup> This intent is further confirmed by the 1965 Report of the Advisory Council on Social Security which referred to "an obligation to support," rather than actual support in referring to the children's insurance program. "The Status of the Social Security Program and Recommendations for its Improvement" 67 (Wash., D.C., 1965).

\*An earlier Senate Report, S. Rep. No. 404, 89th Cong., 1st Sess. 110; 1965 U.S. Code Cong. & Admin. News, p. 2050, is ambiguous on this same point, stating that benefits are intended "to replace support lost by a child when his father...dies...." However the Senate Report is interpreted, the Conference Committee Report is entitled to more

In the light of this legislative history, the purpose of the "living with" or "support" provision is not to require a showing of actual support, but to verify paternity. This purpose is consistent with the structure of the Act. The "living with" or "support" requirement, 42 U.S.C. §416 (h) (3) (C) (ii), is an alternative to requirements that an illegitimate child show either that he could inherit under state law, §416 (h) (2) (A), that he was illegitimate by reason of an impediment to marriage when the ceremony was performed, §416 (h) (2) (B), or that he had been acknowledged or found by a court to be the child of the wage earner, §416 (h) (3) (C) (i). Each of the three other routes to eligibility requires proof relating to paternity, not evidence of previous support. Prior support is thus only one of several ways of verifying paternity, not a separate condition of eligibility under the Act. This conclusion is further buttressed by the fact that neither legitimate children nor illegitimate ones who met any of the other special conditions have to show actual support.

Since prior support is not a condition of eligibility for children's benefits, the rationale of the . . . . . weight since it came at the last, most crucial stage of the legislative process.

district court that the challenged provisions are necessary to insure actual dependency, Slip Opinion, p. 11, is without legal basis.

Plaintiff agrees that proof of paternity, unlike evidence of prior support, is a condition of eligibility for benefits. In this case, however, defendant does not dispute that infant plaintiff is the wage earner's son. Thus the claim cannot be fraudulent and the policy of avoiding "spurious" claims can provide no justification for the challenged discrimination.

C. Even if it is the policy of the Act to deny benefits to children not previously supported, 42 U.S.C. § 416 (h) (3) (C) (ii), is unconstitutional under Jimenez because it is over and under-inclusive.

Even if we accept the assumption of the district court that a purpose of the Social Security Act is to bar claims by children who were not actually supported by the deceased wage earner, 42 U.S.C. §416 (h) (3) (C) (ii) is still unconstitutional under Jimenez. Such a purpose cannot justify the challenged classification because the statute is not narrowly drawn to achieve this goal. Rather the statute is grossly over and under-inclusive.

The Supreme Court has held in numerous contexts that when a statutory classification impinges on fundamental rights, it will be struck down unless it is narrowly and precisely drawn to achieve its intended purpose. See, e.g., Skinner v. Oklahoma, 316 U.S. 535 (1942); Aptheker v. Secretary of State, 378 U.S. 500 (1964). The Court applied this approach explicitly in Jimenez, finding that the statute was both over-inclusive and under-inclusive. 94 S. Ct. at 2502.

In this respect, this case is closely parallel to Jimenez, where the Court said,

"Even if children might rationally be classified on the basis of whether they are dependent on their disabled parent, the Act's definition of these two subclasses of illegitimates is 'over-inclusive' in that it benefits some children who are legitimated, or entitled to inherit, or illegitimate solely because of a defect in the marriage of their parents, but they are not dependent on their disabled parent." 94 S. Ct. at 2502.

In the present case, the identical subclass of illegitimates who get benefits is over-inclusive because many of its members were not dependent on the deceased wage earner. The Court noted in Jimenez that the Secretary did not "suggest a basis for assumption that all illegitimates who are statutorily deemed entitled to benefits under the Act are in fact dependent on their disabled parent." 94 S. Ct. at 2502. Neither does the Secretary suggest a basis for the identical assumption in this case. The challenged classification is also under-inclusive in that it denies benefits to children like infant plaintiff who, as found by the district court, received at least some actual support from the wage earner. Thus, an acknowledged illegitimate child, who was never supported by his deceased parent, gets benefits, while plaintiff, who did receive actual support, gets nothing.

Another way to see the unconstitutional imprecision of the challenged classification is to view the presumed dependency given by the Act to legitimate children and many illegitimate ones as itself a benefit, which is distributed in a discriminatory manner. This benefit is denied only to certain illegitimate children. The sole justification which might be offered for this discrimination is administrative convenience: arguably most legitimates and members of the favored categories of illegitimate children are likely to be dependent and the disfavored illegitimates are less likely to be. But this type of sociological assumption, offered without proof, was specifically rejected by the Court in Jimenez as a justification for the challenged statute. 94 S. Ct. at 2501-02. It is no more valid here.

A similar situation was considered by the Supreme Court in Frontiero v. Richardson, 411 U.S. 677 (1973). In Frontiero, male members of the uniformed services were entitled to claim their spouses as dependents for purposes of getting certain benefits without proof of actual dependency, while female members were forced to prove actual dependency. Thus a man could get the benefits even though his spouse was not dependent on him, while a woman could not. The government asserted

"that, as an empirical matter, wives in our society frequently are dependent upon their husbands while husbands rarely are dependent on their wives. Thus, the Government argues that Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact." Id. at 688-89.

The Supreme Court rejected this approach noting that the government offered "no concrete evidence" for its view.

Id. at 689. The Frontiero court went on to point out that

"These statutes seize upon a group- women- who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping on additional economic disadvantages." Id. at 689, n. 22.

This case presents an almost identical situation. A conclusive presumption of dependency is made for a favored group based on no concrete evidence. See also Jimenez v. Weinberger, supra at 2502. And a disadvantaged group is denied the benefit of the presumption based on the assumed effects of past discrimination: in this case an assumed refusal of parents to support certain illegitimate children. As the Court found in Frontiero, this kind of

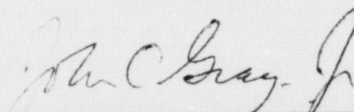
proffered justification is constitutionally inadequate.

Thus, upon whatever assumptions are made about the intent of the Social Security Act, 42 U.S.C. §416 (h) (3) (C) (ii) is unconstitutional under the reasoning of the Supreme Court in Jimenez and Frontiero.

CONCLUSION

For all of the foregoing reasons, the decision and order of the district court should be reversed and remanded to the district court with instructions to enter summary judgment for plaintiff.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

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DEVLIN ADAMS

Plaintiff-Appellant

- against -

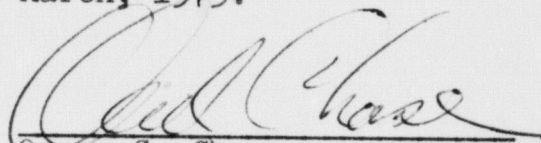
CASPAR WEINBERGER

Defendant-Appellee  
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Docket No. 75-7098

AFFIRMATION OF SERVICE

OSCAR G. CHASE, an attorney admitted to practice before this Court, hereby affirms that copies of the within Appendix and the within Brief of Plaintiff-Appellant were served by him by mailing them to David G. Trager, U.S. Attorney, E.D.N.Y., attorney for the defendant-appellee, on this 17th day of March, 1975.

  
Oscar G. Chase

Dated: March 17, 1975  
Brooklyn, N. Y.